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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 464

CLAYTON MARK & COMPANY, ENAMELED METALS COMPANY, FRETZ-MOON TUBE COMPANY, INC., JAMES M. BARTON, GENERAL ELECTRIC COMPANY, LACLEDE STEEL COMPANY, THE M. B. AUSTIN COMPANY, NATIONAL ELECTRIC PRODUCTS CORPORATION, I. A. BENNETT, REPUBLIC STEEL CORPORATION, SPANG CHALFANT, INC., H. G. MORROW, STEELDUCT COMPANY, TRIANGLE CONDUIT & CABLE CO., INC., AND THE YOUNGSTOWN SHEET AND TUBE COMPANY,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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December 14, 1948

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FEDERAL TRADE COMMISSION,

Respondent.

No.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, above named, respectfully pray for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review a decree of that Court (R. 3710-16), entered August 17, 1948, affirming and commanding obedience to an order to cease and desist of the Federal Trade Commission issued June 6, 1944. A

certified transcript of the record in this case, including the proceedings in said Court of Appeals, is furnished herewith in accordance with Rule 38(1) of the Rules of this Court.

Statement

This case presents the question, for the first time in this Court, whether a seller of conduit may independently make use of a basing-point method of quoting prices for and selling conduit, with knowledge that other conduit sellers are also using that method, but without agreement, combination or conspiracy with such other sellers or any of them and without discrimination in price which is unlawful under Section 2 of the Clayton Act, as amended. That question is one of far-reaching importance, presenting as it does serious consequences to the entire economic and business structure of the country, and one that was not presented to, and therefore was not decided by, this Court in *Federal Trade Commission* v. *Cement Institute et al.*, 333 U. S. 683 (1948), or in any other case.

Rigid steel conduit (usually referred to herein as conduit) is made of standard steel pipe, either galvanized or enameled (R. 1117-18, 1710-11). It is used primarily in building construction as a raceway through which electric wires may be drawn (R. 677, 1119, 1122). Conduit is a standardized commodity which must meet minimum specifications of, and is subject to inspection by, The Underwriters Laboratories, Inc., which is sponsored by the National Board of Fire Underwriters (R. 677, 1123-27, 2097-98).

The petitioners are sellers of conduit. Eight of them (Enameled Metals Company, Fretz-Moon Tube Company,

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Inc. General Electric Company, Laclede Steel Company, National Electric Products Corporation, Spang Chalfant, Inc., Triangle Conduit & Cable Co., Inc., and The Youngstown Sheet and Tube Company) manufacture the conduit that they sell (Resp. Ex. 30, R. 1133); the other four petitioners (Clayton Mark & Company, The M. B. Austin Company, Steelduct Company and Republic Steel Corporation) sell conduit made for them by one or another of said conduit manufacturers (R. 803-05, 812-13, 958, 1827).

Of the 10 manufacturers of conduit which were in existence at the time of the issuance of the Order of the Federal Trade Commission the affirmance of which by the Seventh Circuit Court of Appeals is here sought to be reviewed, the plants of seven, which produce over 75% of all manufactured conduit, are located either in Pittsburgh or in an area surrounding Pittsburgh from which freight rates to destinations outside of the area are in general the same as freight rates from Pittsburgh (Resp. Ex. 30, R. 1133). Just to the west of Pittsburgh are the plants of the petitioner The Youngstown Sheet and Tube Company at Struthers, Ohio, and Indiana Harbor, Ind., and, to the south and west, the relatively small plant of the petitioner Laclede Steel Company at St. Louis, Mo. To the east of Pittsburgh, near Philadelphia, is the plant of Walker Brothers at Conshohocken, Pa., the only conduit plant of substantial productive capacity that is not located at or near Pittsburgh. Of the parties to the proceeding in the court below, Walker Brothers is the only conduit manufacturer which is not a party to this petition for certiorari.

From the origin of the domestic conduit industry in Pittsburgh in 1897, conduit has been quoted and sold at delivered prices, although most conduit manufacturers do,

upon request, quote and sell on an f. o. b. mill basis (R. 944, 1053, 1229-30, 1414-15). The reason why delivered prices have been used lies in the relative importance of transportation charges in the sale of conduit. Such charges form a substantial part of the cost of conduit laid down at any point which is at all remote from the place of manufacture (R. 1264, 1507, 1875), and purchasers of conduit, who are generally speaking building contractors, prefer delivered prices to f. o. b. mill prices in order that they may readily compare quotations by competing sellers located at different distances from the point of delivery (R. 850, 1509, 1727-28, 2174, 2277-78).

The quotation of delivered prices by means of price lists showing separately the prices for all sizes and types of conduit at all possible points of delivery presents obvious mechanical difficulties, both in terms of the paper work involved and in terms of making price changes as required to meet competition. Accordingly, the delivered prices quoted by each of the petitioners have generally been quoted, in form, as the sum of two factors—(1) a specified dollar amount for each size and type of conduit at a basing point,* and (2) a dollar amount equivalent to the freight charges on the quantity of conduit in question from such basing point to the point of delivery. Under the basing-point method of quoting prices for conduit, a change in the de-

*At the time of the hearings before the Commission, following a practice previously inaugurated by one of the conduit manufacturers, conduit was quoted and sold at delivered prices based on Chicago as well as Pittsburgh (R. 1989-90; Com. Exs. 53-70, R. 350-55; Resp. Exs. 302-05, 331, R. 2431-32, 2467). Under that practice, the delivered prices at which sales would be made would depend on which base price, with freight from the basing point added, would give the lower price at the desired destination (R. 1732-33).

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livered price quotation is made by merely changing the dollar amount specified for the basing point, which dollar amount is sometimes referred to, for convenience, as the "base price".

The Commission's Order to cease and desist was made in a proceeding instituted January 25, 1941, by the issuance of a complaint against the petitioners and others which contains two separate counts. Count I of the complaint charges a combination and conspiracy to suppress price competition by various alleged means, including use of the basing-point method of quoting prices, in violation of Section 5 of the Federal Trade Commission Act (R. 3-18). Count II of the complaint, however, does not allege any agreement, combination or conspiracy but charges that the mere use of the basing-point method of quoting prices by each individual conduit seller, with knowledge that others are also using it, constitutes in and of itself an unfair method of competition under Section 5 of the Federal Trade Commission Act (R. 18-21). Nor does Count II of the complaint charge a violation of Section 2 of the Clayton Act, as amended. The Commission expressly disclaimed any such charge at the hearings before the Trial Examiner (R. 1161-62) and in its brief in the court below (Com. Br. p. 23).

The conclusion reached by the Commission was that the acts and practices of which it had complained constituted "unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act" (R. 3543) and, on June 6, 1944, the Commission issued an order to cease and desist therefrom (R. 3544-48).

Under Count I, the Commission ordered all of the petitioners except Spang Chalfant, Inc., to cease and desist

from carrying out any planned common course of action in respect of quoting or selling conduit at prices determined pursuant to the basing-point system or in respect of any of the other practices complained of (Paragraph I* of the Order, R. 3544-46). Count I of the complaint was dismissed as to petitioner Spang Chalfant, Inc., which was found not to have been a party to the conspiracy therein charged.

Under Count II of the complaint, the Commission in Paragraph V* of its Order (R. 3547-48) enjoined each of the petitioners (including Spang Chalfant, Inc.):

> "* * * from doing any of the following things for the purpose or with the effect of systematically matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill nets received on sales to different purchasers:
>
> "(a) Quoting or selling rigid steel conduit at prices calculated or determined pursuant to or in accordance with, the basing-point, delivered-price system.
>
> "(b) Quoting or selling rigid steel conduit at delivered prices calculated as, or systematically equivalent to, the sum of the price in effect at, plus a transportation charge factor from, any point other than the actual shipping point.
>
> "(c) Quoting or selling rigid steel conduit at delivered prices which systematically reflect the in-

*The Commission's Order to cease and desist (R. 3544-48), contains seven separate paragraphs (unnumbered but herein sometimes referred to as Paragraphs I through VII, respectively), each beginning with the words "It Is Ordered" or "It Is Further Ordered".

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clusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination.

"(d) Discriminating among purchasers by quoting or selling rigid steel conduit at prices which systematically differ in terms of mill nets according to the location of purchasers, and which mill nets, plus common carrier transportation charges to the respective locations of such purchasers, produce delivered costs identical with those to such purchasers from differently located respondents."*

Petitions were thereafter filed in the Seventh Circuit Court of Appeals to review and to set aside the Commission's Order (R. 3556, 3566, 3579, 3610, 3634). After such proceedings had been argued, but before they were decided, this Court handed down its decision in *Federal Trade Commission* v. *Cement Institute, et al.* (333 U. S. 683) (hereinafter sometimes called the *Cement* case), decided April 26, 1948. Shortly thereafter (on May 12, 1948), the Seventh Circuit Court of Appeals rendered its decision in this case, affirming the Commission's Order and direct-

*In order for a conduit seller, A, to sell conduit regularly in any given market in competition with another conduit seller, B, located nearer freightwise to that market, A must, except in rare instances, "systematically" meet B's delivered price quotations. Accordingly, while the injunction against the practices prohibited by Paragraph V of the Order is made subject to the limitation, in the introductory clause and in subparagraph (d) that such practices "produce" delivered prices uniform as among different sellers, such apparent limitation does not have any practical significance, and, therefore, in the interests of clarity, we shall hereafter in this brief refer to the injunctive provisions of Paragraph V without further specific mention of such limitation.

ing the entry of an enforcement decree (R. 3678; 168 F. (2d) 175).

The petitioners believe that the Order, in so far as it enjoins conduct by them pursuant to an alleged combination and conspiracy to fix prices, is unsupported by the findings of the Commission or by the evidence and they argued in the court below that the Order should be set aside on that ground. The court below, however, following the decision of this Court in the *Cement* case, concluded that the Commission was justified in drawing the inference that the petitioners had acted in concert in a price-fixing conspiracy. While the petitioners disagree with that conclusion, they recognize that their arguments against it would in large part duplicate the corresponding arguments unsuccessfully addressed to this Court by the petitioners in the *Cement* case and, accordingly, the present petition is confined to that portion of the Order which enjoins individual conduct in the absence of any combination or conspiracy.

With respect to Count II of the complaint and the corresponding portion of the Commission's Order, the court below acted under the evident misapprehension that the legal question presented in this case "is identical with the one the Supreme Court considered in the *Federal Trade Commission* v. *Cement Institute* case" (R. 3687; 168 F. (2d) at p. 181), and, apparently without independent analysis of .the novel question actually presented in this case, concluded that "In the light of that opinion [*i.e.*, the opinion of this Court in the *Cement* case], we cannot say that the Commission was wrong in concluding that the individual use of the basing point method as here used does constitute an unfair method of competition" (R. 3688; 168 F. (2d) at p. 181).

A petition for rehearing, filed May 25, 1948 (R. 3689), was denied without opinion on June 14, 1948 (R. 3703).

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Jurisdiction to Review

Jurisdiction of this Court is invoked under Title 28 United States Code, Sections 1254(1) and 2101. The decree of the Court of Appeals for the Seventh Circuit to be reviewed was entered August 17, 1948 (R. 3710-16). By order of this Court dated October 29, 1948, the petitioners' time within which to file a petition for certiorari was extended to December 15, 1948 (R. 3719).

The Questions Presented

1. Whether, in the absence of agreement, combination or conspiracy and in the absence of a charge or finding of any discrimination in price which is unlawful under Section 2 of the Clayton Act, as amended, the independent use by a conduit seller of a basing-point method of quoting delivered prices for conduit and the sale of conduit at the delivered prices so quoted constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act.

2. Whether, in the absence of agreement, combination or conspiracy and in the absence of a charge or finding of any discrimination in price which is unlawful under Section 2 of the Clayton Act, as amended, the quoting or selling by a conduit seller of conduit at delivered prices which systematically reflect the inclusion of a transportation factor that is greater or less than the actual cost of transportation from the point of shipment to the point of delivery constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act.

3. Whether, in the absence of agreement, combination or conspiracy and in the absence of a charge or finding of any discrimination in price which is unlawful under Section 2 of the Clayton Act, as amended, the quoting

or selling by a conduit seller of conduit at prices which systematically differ in terms of mill nets according to the location of purchasers, constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act.

Reasons Relied On for the Allowance of the Writ

1. In deciding that the independent use by a conduit seller of the basing-point method of pricing, with knowledge that other conduit sellers are also using that method but without conspiracy with such other sellers and without any price discrimination which is unlawful under Section 2 of the Clayton Act, as amended, constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, the court below decided an important question of federal law which has not been, but should be, settled by this Court.

2. In deciding that the quoting or selling of conduit, by the basing-point method or by any other method, at delivered prices which systematically reflect the inclusion of a transportation factor that is greater or less than the actual cost of transportation from the point of shipment to the point of delivery constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, the court below decided an important question of federal law which has not been, but should be, settled by this Court.

3. In deciding that the quoting or selling of conduit, by the basing-point method or by any other method, at delivered prices which systematically differ in terms of mill nets according to the location of purchasers constitutes an unfair method of competition under Section 5 of the Fed-

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eral Trade Commission Act, the court below decided an important question of federal law which has not been, but should be, settled by this Court.

4. The decision of the court below, predicated upon the erroneous assumption that the questions here presented had already been decided by this Court in the *Cement* case, has created widespread confusion and uncertainty not only among the public generally but also among the members of the Federal Trade Commission and its counsel, as evidenced in part by the public hearings currently being held, pursuant to Senate Resolution 241 (80th Cong., 2d Sess. (1948)), by the Senate Trade Policies Committee, a subcommittee of the Senate Committee on Interstate and Foreign Commerce.

5. The economic consequences of the determination by the court below that the practices attacked by the Federal Trade Commission in this case are unlawful in the absence of conspiracy and in the absence of any charge or finding of violation of Section 2 of the Clayton Act, as amended, are so drastic and far-reaching as to call for an exercise of this Court's power of supervision.

6. Because the foregoing reasons for granting the writ seemed to petitioners to foreclose the possibility of opposition to the petition, petitioners inquired of counsel for the Federal Trade Commission what position the Commission would take with respect to a petition for certiorari in this case. In response to such inquiry, such counsel stated that the question whether any opposition will be made to the granting of this petition is a question to be decided by the Solicitor General, but that the Commission (which investigated the facts, prepared and filed the complaint herein, heard the case, made the Order, affirmance of Paragraph V

of which is here sought to be reviewed, and urged its enforcement in the court below) concurs in the view that Count II of the complaint herein and the corresponding portion of the Commission's Order present an important question of law that has not been, but should be, decided by this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of all proceedings heretofore had in said Court of Appeals in this cause, to the end that this cause may be reviewed and determined by this Court; that the decree of said Court of Appeals be reversed to the extent that such decree affirms Paragraph V of the Commission's Order; and that your petitioners be granted such other and further relief as may seem proper.

CLAYTON MARK & COMPANY *et al.*,
Petitioners,

By

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December 14, 1948

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BRIEF IN SUPPORT OF PETITION

Opinion of the Court Below

The opinion of the Seventh Circuit Court of Appeals, handed down on May 12, 1948 (R. 3678), is reported at 168 F. (2d) 175.

ARGUMENT

POINT I

THE ASSUMPTION BY THE COURT BELOW THAT THE QUESTIONS HERE PRESENTED HAD BEEN DECIDED BY THIS COURT IN THE *CEMENT* CASE IS ERRONEOUS.

With reference to the issues presented by Count II of the complaint and the corresponding portion of the Order (par. V), the court below stated in its opinion (R. 3687; 168 F. (2d) 175, 181):

> "In this situation, and indeed all parties to these proceedings agree, the legal question presented is identical with the one the Supreme Court considered in the *Federal Trade Commission* v. *Cement Institute* case, *supra*" [333 U. S. 683 (1948)].

That statement discloses that the Court misapprehended the facts in two respects:

(a) The legal question presented by Count II of the complaint in the *Conduit* case is not identical with (or even similar to) any question considered by this Court in the *Cement* case; and

(b) The parties to these proceedings *have never agreed* that the question presented by Count II of the

complaint herein is identical with any question considered by this Court in the *Cement* case.

The statement in the opinion that " all parties to these proceedings agree" that the question is identical with that considered by this Court in the *Cement* case overlooks the fact that both the petitioners and the Commission had definitely and positively asserted the contrary to the court below.

On September 8, 1947, the Commission moved the court below to postpone all further proceedings in that court in the *Conduit* case until thirty days after this Court should have decided the *Cement* case. The Commission stated as its ground for that motion that petitioners were "relying in numerous and important respects as shown by their briefs" upon the expectation that the decision of this Court in the *Cement* case would be favorable to their contentions. In opposition to that motion the petitioners submitted an affidavit, sworn to September 15, 1947, which set forth the differences between the *Cement* case and the *Conduit* case as follows (R. 3691-92):

> " * * * The complaint in the *Conduit* case charges, and the Commission here has held, that the independent use of the basing-point method of quoting prices by a conduit seller is illegal *per se* irrespective of the existence or non-existence of a conspiracy. * * * In the *Cement* case, however, the complaint in its entirety was limited to charges of conspiratorial action, and even if the decision of this Court in that case should be reversed or modified, such disposition of that case could not possibly be determinative of the issues presented in the *Conduit* case.
>
> "That essential difference between the two cases has heretofore been recognized by counsel for the

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Commission. Directly after the Supreme Court, on March 10, 1947, granted certiorari in the *Cement* case, counsel for one of the petitioners in the *Conduit* case inquired of counsel for the Commission as to the latter's views concerning the desirability of arguing the *Conduit* case in this Court [*i.e.*, the Seventh Circuit Court of Appeals] in advance of a decision by the Supreme Court in the *Cement* case. In response to that inquiry, counsel for the Commission, * * * replied that 'No matter how the Cement case may be decided by the Supreme Court, the Rigid Steel Conduit case must stand or fall upon its own factual foundation', pointing out that:

> " 'So far as Count II of the case is concerned, it raises a question of law which cannot be determined by the outcome of the Cement case because the latter case is founded in both counts on the theory of conspirary and in the Conduit case, Count II raises the question of the status of the basing point practice as an unfair method of competition and independently of the question of conspiracy.' "

Moreover, on the oral argument before the court below on January 19, 1948, counsel for the Commission, in distinguishing the *Conduit* case from the *Cement* case in reply to a question by the Court, made the following statement (R. 3692):

> "* * * we have a Count II that is founded upon Section 5 of the Federal Trade Commission Act, and we had no such question in the Cement case, in that Count II herein is not grounded upon combination or conspiracy, but solely upon the use by each petitioner of the basing-point system, and the effect of that use upon competition."

Quite apart from the position taken by the respective parties, the fact is that the differences between the *Conduit* case and the *Cement* case are of vital importance. In each case, the complaint contains two counts. In each case, Count I of the complaint charges violation of Section 5 of the Federal Trade Commission Act by a combination and conspiracy to suppress price competition in part by use of the basing-point method of quoting prices, and, on that phase of the two cases, there are, of course, several common questions of law. But the question here presented relates only to Count II of the complaint in this case, which charges that the independent use of the basing-point method of quoting prices by each petitioner—individually and not pursuant to combination or conspiracy—constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act. Count II of the complaint in the *Cement* case, on the other hand, charged that the use of the basing-point method of quoting prices, *pursuant to a combination and conspiracy*, resulted in price discrimination in violation of *Section 2 of the Clayton Act, as amended.*

The points of difference are, therefore:

(1) the charge and finding in the *Conduit* case that the independent use of the basing-point method, in the absence of a combination or conspiracy, constitutes an unfair method of competition, a charge and finding which were not made in the *Cement* case; and

(2) the charge and finding in the *Cement* case of price discrimination in violation of Section 2 of the Clayton Act, as amended, a charge and finding which were not made in the *Conduit* case.

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In view of the charge and finding of combination and conspiracy on both counts of the complaint in the *Cement* case, the decision of this Court in that case cannot properly control the disposition of the Commission's charge in the instant case that independent action by each of the petitioners in using the basing-point method of quoting prices is illegal. The importance to the decision in the *Cement* case of the element of combination and conspiracy was emphasized by this Court in distinguishing (333 U. S. at p. 706) that decision from the Court's earlier decision in *Cement Mfrs. Protective Association* v. *United States,* 268 U. S. 588 (1925), and in disposing of the objections to the scope of the order in the *Cement* case (333 U. S. at pp. 727-29). Thus the Court said (pp. 727-29):

> "Most of the objections to the order appear to rest on the premise that its terms will bar an individual cement producer from selling cement at delivered prices such that its net return from one customer will be less than from another, even if the particular sale be made in good faith to meet the lower price of a competitor. The Commission disclaims that the order can possibly be so understood. Nor do we so understand it. As we read the order, all of its separate prohibiting paragraphs and subparagraphs, which need not here be set out, are modified and limited by a preamble. This preamble directs that all of the respondents 'do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy, between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following

things * * *' Then follow the prohibitory sentences. It is thus apparent that the order by its terms is directed solely at concerted, not individual activity on the part of the respondents.

* * * * * * * *

"One other specific objection to the order will be noted. Paragraph 1 prohibits respondents from 'quoting or selling cement pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for cement at points of quotation or sale or to particular purchasers by respondents using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents against any of the other respondents.' This paragraph like all the others in the order is limited by the preamble which refers to concerted conduct in accordance with agreement or planned common course of action. * * *"

In addition to the emphasis thus placed by the majority of this Court on the element of combination and conspiracy in the *Cement* case, Mr. Justice Burton, in his dissenting opinion, pointed out explicitly that while the Court in that case held that there was a violation both of Section 5 of the Federal Trade Commission Act and of Section 2 of the Clayton Act, as amended, it

> "has not here determined the relation, if any, of either of the foregoing statutes to the absorption of freight charges by individuals when not participating in a combination of the kind charged by the Commission." (333 U. S. at p. 733)

POINT II

THE INDEPENDENT USE OF THE BASING-POINT METHOD OF PRICING, ABSENT CONSPIRACY AND ABSENT PRICE DISCRIMINATION UNLAWFUL UNDER SECTION 2 OF THE CLAYTON ACT, AS AMENDED, HAS NOT HERETOFORE BEEN PROHIBITED EITHER BY THE CONGRESS OR BY THE COURTS.

Paragraph V of the Commission's Order (affirmed by the court below) enjoins the use by each petitioner, individually and without combination or conspiracy, of the basing-point method of quoting prices or any other method of quoting or selling conduit at delivered prices which meet the delivered prices of other petitioners at any location and which, as among purchasers from a single petitioner "systematically differ in terms of mill nets according to the location of purchasers" or "systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination" (R. 3547-48). The effect of that portion of the Order is to prevent each petitioner, acting individually and not in combination, from competing for business in a territory in which any other seller of conduit has a freight advantage. As conceded by the Commission in its brief in the court below (p. 62), that part of its Order is "novel and far reaching".

The decision of the court below has imposed upon manufacturers of conduit the economic theory of the Commission that each manufacturer should operate solely within the territory in which it has a "natural freight advantage" and should not be allowed to compete for business in any territory in which any of its competitors have such an advantage. Such theory is reflected in the Commission's

Findings (Paragraph SEVENTEEN (d), R. 3540-41) that "In effect, this pricing pattern [*i.e.*, delivered prices pursuant to the basing-point pricing method] amounts to each seller inviting other sellers to share in the available business in his freight-advantage territory in return for the privilege of sharing in the available business in the freight-advantage territory of other sellers", and that "By denying to some purchasers the advantages of their location with respect to points at which conduit is produced, sellers are enabled to subsidize their own sales to other purchasers who are not so favorably located".

The Congress, although frequently urged to do so, has never adopted the Commission's theory, and until the decision of the court below in the instant case, the Commission's theory had never been adopted by any court.

(a) The Congress has consistently refused to declare the independent use of the basing-point method of pricing, in the absence of unlawful price discrimination, to be illegal.

Preliminarily, it should be noted that petitioners recognize that differences in prices quoted by a single seller pursuant to the basing-point method of pricing—or pursuant to any other method of pricing—may constitute unlawful discrimination in price as between different purchasers from that seller under the provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The existence of such unlawful discrimination, however, depends not upon the use of any given method of price quotation, but upon the facts with respect to the prices actually charged, the cost of manufacture, sale or delivery, and competitive conditions.

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But in the present case there is not any charge or finding that there has been any discrimination in price by any of the petitioners, individually or collectively, violative of the Clayton Act. As the Commission said in its brief before the court below (p. 23):

> "It cannot be too strongly emphasized that there is no charge and no finding and therefore can be no issue as to whether there has been any discrimination in price violative of Section 2(a) of the Clayton Act as amended."

While admitting that there is not any issue with respect to price discrimination under the Clayton Act, the Commission asserted before the court below (Br. p. 77) the novel proposition that price differences, not unlawful under Section 2 of the Clayton Act, as amended, may nevertheless be unlawful as an unfair method of competition under Section 5 of the Federal Trade Commission Act. But that position is manifestly untenable for the reason that the Congress has, by Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, legislated in the specific field of price discrimination and has not left any room for the Commission, under the guise of "interpretation" of the term "unfair methods of competition" in Section 5 of the Federal Trade Commission Act, to find unlawful any differences in price as between purchasers from a given seller which are permitted by the Congress.

Indeed, the legislative history of the Robinson-Patman Act, and the consistent refusal of the Congress to enact an anti-basing-point law (see, *e.g.*, the so-called Wheeler Anti-Basing-Point Bill (S. 4055, 74th Cong., 2d Sess., 1936), *Hearings Before Senate Committee on Interstate Commerce on S. 4055,* 74th Cong., 2d Sess., 325 (1936), THE BASING

POINT PROBLEM 140 (TNEC Monograph 42, 1941), *Hearings Before TNEC,* 76th Cong., 3d Sess. 14329 (1940), clearly indicate the unwillingness of the Congress to outlaw the basing-point method of pricing.

The Bill (H. R. 8442, 74th Congress) which, after revision, became the Robinson-Patman Act, as reported by the House Judiciary Committee (H. R. REP. No. 2287, 74th Cong., 2d Sess. 2 (1936)) contained the following definition of "price", which is the same as the "mill net" definition of price advanced by the Commission in the present case:

> "(5) That the word 'price', as used in this section 2, shall be construed to mean the amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor."

The purpose of that proposed provision was thus stated by such Committee at page 14 of its Report:

> "* * * In effect, this provision of the bill is designed to put an end to price discrimination through the medium of the basing-point or delivered-price system of selling commodities. It will require the use of the f.o.b. method of sale."

Thereafter, while the Bill was under debate in the House, the Committee itself recommended that the Bill be amended by striking out the proposed "mill net" definition of price (80 Cong. Rec. 8223 (1936)). That recommendation was unanimously adopted by the House, and such provision was stricken from the Bill (80 Cong. Rec. 8140, 8224 (1936)).

As this Court pointed out in *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726, 737

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(1945), with reference to the rejected paragraph 5 of the Robinson-Patman Bill:

> "Such a drastic change in existing pricing systems as would have been effected by the proposed amendment engendered opposition, which finally led to the withdrawal of the provision by the House Committee on the Judiciary. 80 Cong. Rec. 8102, 8140, 8224. *We think this legislative history indicates only that Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal per se. On the contrary we think that it left the legality of such systems to be determined accordingly as they might be within the reach of § 2(a) [of the Clayton Act], as enacted, and its more restricted prohibitions of discriminations in delivered prices.*" (Emphasis supplied.)

The basing-point method of pricing used by the petitioners, however, is not even claimed to be "within the reach" of Section 2 of the Clayton Act, as amended. The Commission and the court below completely disregarded that pronouncement of this Court in the *Corn Products* case that the legality of any price discrimination resulting from the use of a basing-point method of pricing is to be determined under the "more restricted prohibitions of discriminations in delivered prices" imposed by the Congress by the Robinson-Patman Act in 1936, and have, instead, declared the petitioners' pricing method unlawful under a prior statutory prohibition against "unfair methods of competition" which had been in effect since 1914.

In substance, what the court below has done in this case is to impose the economic theory of the Commission upon the conduit industry, without regard to the fact that

the Congress has specifically rejected that theory. But it is axiomatic that the legislative power resides in the Congress and not in the Commission or the courts. It is for the Congress to determine the public policy of the United States. Except as otherwise shown by statute, public policy is to be derived from the principles of the common law. When the Congress has acted upon a subject matter within the scope of the legislative power vested in it, public policy then becomes that which the Congress has declared. Neither the courts nor administrative commissions are empowered to declare the public policy of the United States on matters within the legislative field in which the Congress has either acted or refused to act. *License Tax Cases,* 5 Wall. 462, 469 (U. S. 1866); *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 340 (1897); *Baker* v. *United States,* 27 F. (2d) 863, 875 (C. C. A. 1st), *cert. den.* 278 U. S. 656 (1929).

That at common law sellers had the right to sell at delivered prices, to meet competition wherever it existed and, in the exercise of such rights, to employ the basing-point method of quoting delivered prices, does not admit of doubt. They can be deprived of that right only by Congressional action. Neither the Commission nor the courts have authority to regiment the nation's business or to control the methods of its conduct, in accordance with such economic theories as may be entertained by the Commission, unless the methods sought to be condemned constitute acts prohibited by statute.

As shown above, the Congress has not prohibited the use of the method of pricing which is here under consideration. On the contrary, the Robinson-Patman Act itself expressly reserves to sellers the rights drawn in question by

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Count II of the complaint. By expressly refusing so to amend the law as to prohibit, in terms, the use of the basing-point method of quoting delivered prices in accordance with the provisions of the Robinson-Patman Bill as first reported to the House, the Congress gave its express and affirmative sanction to its continued use, subject only to the specific prohibition against discrimination contained in that Act.

(b) Until the decision in this case by the court below, the independent use of the basing-point method of pricing, in the absence of unlawful price discrimination, had never been declared illegal by any court.

In so far as counsel for petitioners have been able to discover, the decision of the court below in this case was the first ruling by any court that the independent use of the basing-point method of pricing, in the absence of conspiracy and of unlawful price discrimination, is illegal. The Commission has never claimed that any court, prior to the present case, had made any such ruling, and, indeed, as stated above, the Commission very frankly characterized its theory of Count II of the complaint in this case as "novel and far reaching".

However, as has been shown above (pp. 13-18) the court below labored under the misapprehension that this Court in the *Cement* case decided the question presented by Count II of the complaint herein. In upholding the Commission's theory, the court below apparently regarded as applicable the statement of this Court in the *Cement* case (333 U. S. at p. 708) that:

> "* * * individual conduct * * * which falls short of being a Sherman Act violation may as a matter of law constitute an 'unfair method of competition' prohibited by the Trade Commission Act."

In the light of the fact that both counts of the complaint in the *Cement* case charged a combination in restraint of trade which would obviously violate the Sherman Act, any reference by the Court to "individual" conduct was necessarily *obiter dictum*. The quoted excerpt appears in that part of the Court's opinion in which the *Old Cement* case (268 U. S. 588) was distinguished from the *New Cement* case. The Court distinguished the cases on two grounds (pp. 708-09):

> (1) In the *Old Cement* case there was not any charge or finding of combination to utilize the basing-point system as a means to bring about uniform prices and terms of sale, but such charge and finding were made in the *New Cement* case; and
>
> (2) the *Old Cement* case was brought under the Sherman Act; and the *New Cement* case [Count I] was a proceeding under the Federal Trade Commission Act.

It was in connection with its discussion of the second ground of distinction that this Court pointed out (p. 708) that "individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law constitute an 'unfair method of competition' ". There was not anything revolutionary about that statement of law.

Of course, in the absence of specific legislation there is wide room for interpretation of the term "unfair methods of competition", as indicated by the two cases cited by this Court in the *Cement* opinion (333 U. S. at 694). *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304 (1934); *Federal Trade Commission* v. *Gratz*, 253 U. S. 421 (1920). But, as the Court said in the *Gratz* case (in

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holding that the conduct there complained of did not constitute an unfair method of competition):

> "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly . . ." (253 U. S. at p. 427).

If, of course, this case involved price discrimination unlawful under Section 2 of the Clayton Act and such price discrimination were asserted as a violation of Section 5 of the Federal Trade Commission Act, the situation would be analogous to that considered by this Court in the *Cement* case with reference to Count I of the complaint in that case, where the Court held that conduct violative of Section 1 of the Sherman Act could also constitute a violation of Section 5 of the Federal Trade Commission Act (333 U. S. at p. 693). But the alleged price discrimination involved in this case is not claimed to be a violation of Section 2 of the Clayton Act, as amended, and the findings of the Commission here do not include the findings which were made in the *Cement* case (and which would be essential to establish a violation of Section 2 of the Clayton Act) that differences in the prices at which each petitioner sold its product to two or more of its customers were not justified under the pertinent provisions of the Clayton Act.

Our point is that in the specific field of price discrimination (as distinguished from the general fields of deceptive trade practices, combinations in restraint of trade and the like), the Congress has authoritatively declared the applicable public policy which may not be frustrated by the device of giving a new "interpretation" to a previously existing statute. And there is nothing in the opinion in the *Cement* case that suggests, even by implication, that this Court intended to alter in any respect its statement in the *Corn Products* case that the legality or illegality of discrimination in delivered prices must be determined on the basis of the provisions of Section 2 of the Clayton Act, as amended.

POINT III

THE ECONOMIC CONSEQUENCES OF THE DECISION OF THE COURT BELOW, IF PERMITTED TO STAND, WILL BE DRASTIC AND FAR-REACHING.

Paragraph V of the Commission's Order which was affirmed by the court below prohibits the independent use by each petitioner not only of the basing-point method of quoting prices, but also of any other method of quoting or selling at prices which meet the delivered prices of other petitioners at any given location and which, as among purchasers from a single petitioner, "systematically differ in terms of mill nets according to the location of purchasers" * or "system-

*The word "systematically", applied to a business operation, can mean nothing more than "regularly" or "repeatedly". The term "mill net" is used by the Commission to describe that part of the delivered price which is left to the seller after deducting the cost of transportation. If the "mill nets" may not differ according to the location of purchasers, then the delivered price to all purchasers must be a uniform mill price plus actual cost of transportation to destination,—*i.e.*, an f.o.b. mill price plus freight.

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atically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination" (R. 3547-48).

It is an established fact that conduit is a standardized commodity which generally cannot be sold in any market except at the lowest price at which it is offered for sale by any seller in that market (R. 706, 1265, 1343, 1520-21, 1757). Consequently, if two or more sellers are to compete in that market, each must meet the lowest price of any of them.

But in the case of a manufacturer more distant from that market than its competitors, the cost of transportation (an important element of the price of conduit in any market (R. 1264, 1507, 1875)) is necessarily higher than that of its competitors, and all or part of that higher cost must be "absorbed" by such manufacturer in order that it may make sales in that market. Consequently, sales by such manufacturer in the more distant market—whatever the method of quoting or selling—will necessarily result in a lower mill net return than in the case of sales made by the same manufacturer to nearer purchasers. Accordingly, if such manufacturer regularly competes in the more distant market, its prices will "systematically reflect the inclusion of a transportation factor . . . less than the actual cost of transportation from point of shipment to destination", and will "systematically differ in terms of mill nets according to the location of the purchasers".

It follows, therefore, that Paragraph V of the Order in the present case prohibits each petitioner from competing with another conduit seller in any territory in which such other conduit seller has a freight advantage.

That result, however, is in direct conflict with, and renders nugatory, the right to meet competition that is expressly recognized by the Robinson-Patman Act, Section 2(b), which authorizes discrimination in price when the lower price to one purchaser is made in good faith to meet an equally low price of a competitor.

That result is also in direct conflict with the theory of free competition underlying all of the anti-trust laws. The Order herein would create in the country a series of regional monopolies because of the necessity for sellers to quote all prices f.o.b. mill. That is clear for two reasons: First, a producer within its own "natural freight advantage" territory would be protected from outside competition by the freight rate barrier, and, secondly, the same barrier would prevent such producer from selling outside its own territory. Such regional monopolies would not be the result of the natural operation of the laws of supply and demand, and would not be the result of any act or wish of the buyers and sellers concerned. They would be the result of the adoption of a theory of the Federal Trade Commission which it for years has urged the Congress to adopt. If the sellers of conduit had entered into an agreement to accomplish the results which would be accomplished by the enforcement of the Order in this case, such agreement would unquestionably, and properly, have been branded by the Commission and by the courts as a gross violation of the anti-trust laws.

The economic consequences which would follow the enforcement of the Order are staggering. Theoretically, of course, each petitioner might have a market for its products within the area in which it has a "natural freight advantage". As a practical matter, however, in most cases a manufacturer cannot long survive if the marketing of his prod-

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ucts is limited to that area. The acuteness of the problem of survival is accentuated in the present case by the situation confronting the seven conduit manufacturers located in or near Pittsburgh, comprising over 75% of the productive capacity of the industry. Manifestly, the limited area in which the Pittsburgh manufacturers have a freight advantage over their competitors to the west and to the east could not provide an adequate market for the products of such manufacturers, and, in order for them to compete for the business on the eastern seaboard and in the far west, a major relocation of manufacturing facilities in the conduit industry would be required.* There is, however, nothing in the record to suggest that the market for conduit is such as to justify such relocation of manufacturing facilities. On the contrary, not only is the total demand for conduit small, but since the use of conduit is practically confined to building construction, the total demand for conduit varies with fluctuations in building activity (R. 1422, 1708, 1773, 1897). The variations in building activity in one location, and hence the demand for conduit in that location, do not generally correspond either seasonally or cyclically with similar variations in other locations (R. 1421-22, 1897). Consequently, the effect of the Order will inevitably be to put some of the petitioners out of business.

The adoption of the Commission's theory would result in widespread and destructive dislocation of existing capital investments in the conduit industry and in all other indus-

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*At the present time, only one conduit manufacturer (Walker Brothers, at Conshohocken, Pa.) is located east of Pittsburgh (Resp. Ex. 30, R. 1133). The effect of the Commission's Order, therefore, is to confer upon that manufacturer a practical monopoly of east-coast business. It will be noted that Walker Brothers, a party to the proceedings below, is not a party to this petition for certiorari.

tries where the cost of delivery represents a significant portion of the total cost of the product to the purchaser. The heavy industries of the United States have, generally speaking, grown up at points where available raw material, fuel, power and transportation to markets, all combine to give the lowest costs at the point of delivery. Because they have been able to distribute their products on a nation-wide basis, such industries have been able to employ mass-production methods which have become world famous, and which have made possible low prices and the rapid introduction throughout the country of products reflecting inventions and improvements in manufacturing.

But the Order herein would make freight rates on finished products* the sole determining factor in the location of new plants, and would have a disruptive and catastrophic effect on existing industry of such magnitude that it cannot be estimated with accuracy. It is, however, clear that enforcement of that portion of the Order which requires that sales to all purchasers be at a uniform mill price (plus, in the case of sales at delivered prices, actual cost of transportation) would injure those producers that,

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*The fallacy of emphasizing the factor of cost of transportation of the finished product, to the exclusion of all other factors entering into delivered prices, is strikingly demonstrated in the *Conduit* case. Thus the Commission cites (FF. 17, R. 3540) Walker Brothers' price for conduit at Philadelphia, "equivalent to the sum of the Pittsburgh base price plus the delivery charge factor from Pittsburgh to Philadelphia", as an illustration of "phantom freight". To be sure, Walker Brothers does not have to pay freight from Pittsburgh to Philadelphia on the finished product. But it does have to pay freight on its principal raw material, standard steel pipe (R. 527)—a cost not incurred by conduit manufacturers located in the vicinity of the steel pipe producers at Pittsburgh.

for reasons other than freight rates, have located plants in small communities. Such a system would militate against manufacturers in small communities generally by causing them to fail because of insufficient outlet for their products, or by requiring them to move their plants to locations near large consuming centers which offer the most concentrated markets.

The Commission did not attempt to explain to the court below (and, indeed, apparently did not make any attempt to understand or appraise for itself) the economic results of the adoption of its theory that the use of the basing-point method of pricing is illegal *per se*. Instead, the Commission persistently clung to its theory and its arguments in support thereof such as its "natural freight advantage" argument, and ignored the immense proportions of the subject with which it was dealing.

The court below did not attempt to evaluate the Commission's theory and its arguments, nor did it advert to the fact that the effect of its affirmance of the Commission's Order might result in completely disrupting the nation's historic and efficient methods of distribution. As has been shown above, the Court merely affirmed the Order under the misapprehension that it was required to do so by this Court's decision in the *Cement* case, and consequently did not give any attention to the drastic effects of its action in so doing.

CONCLUSION

It is respectfully submitted that this case calls for the exercise of supervisory powers by this Court and that the writ should be allowed.

Respectfully submitted,

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